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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 1276

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

ALDRED INVESTMENT TRUST, et al.,

Defendants,

Application of J. N. Welch, R. A. B. Cook and Louis Bernstein for allowance of fees.

Application of George B. Rowlings for allowance of fees.

FRANK BAILEY, et al.,

Intervenors-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND SUPPORTING BRIEF.

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SAMUEL H. KAUFMAN,
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MILTON S. GOULD,
HENRY M. LEEN,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND SUPPORTING BRIEF.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, by Samuel H. Kaufman, their attorney, pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the First Circuit, rendered February 24, 1947. That judgment affirmed in part a judgment of the United States District Court, District of Massachusetts, which, insofar as here material, allowed compensation to Respondents Welch, Cook and

Bernstein in the sum of $75,000, and to Respondent Rowlings in the sum of $14,000, for services rendered by them as attorneys for plaintiff and intervenor, respectively, in the action entitled "*Stratton* v. *Aldred Investment Trust*".

Jurisdiction.

The basis of jurisdiction is Section 240(a) of the Judicial Code.

Summary Statement of Matters Involved.

The Aldred Investment Trust is a Massachusetts Trust, organized in 1927 under an Agreement and Declaration of Trust. It is registered with the Securities and Exchange Commission under Section 8 of the Investment Company Act of 1940 as a "Closed End Management Investment Company". The Trust has outstanding $5,900,000 of 4½% debentures due 1967. To each $1,000 debenture are attached ten shares of common stock without par value. Also outstanding are 112,500 shares of "free" common stock, so that altogether 171,500 shares of common stock are outstanding, 59,000 of which belong to the debentureholders.

In October, 1941, Gordon B. Hanlon acquired 110,000 shares of the free stock of Aldred, constituting control of the Trust; Hanlon became President and certain of his associates were elected other officers and trustees.

On March 8, 1944, a suit was commenced in the United States District Court, District of Massachusetts, by Stratton, a holder of five Aldred debentures, to enjoin Hanlon and the other officers and trustees of Aldred from continuing to act in that capacity, and for the appointment of Receivers (R. 89). Respondent Welch was attorney for plaintiff in that action; respondent Rowlings was attorney for an intervening plaintiff.

On May 19, 1944, before any substantial action had been taken in the *Stratton* case, the Securities and Exchange Commission commenced a proceeding in the same court under the Investment Company Act of 1940, for similar relief (R. 2-11). The District Court held, in the action instituted by the Securities and Exchange Commission, that the officers and trustees had been guilty of misconduct and of a gross abuse of trust and granted the relief prayed for [58 Fed. Supp. 724 (R. 136)]. The judgment was affirmed in the Circuit Court of Appeals, 151 Fed. Supp. 254 (C. C. A. 1st, 1945), and this Court denied certiorari, 326 U. S. 795.

In view of the decision in the action instituted by the Securities and Exchange Commission, the *Stratton* case was dismissed (R. 117, 137).

The District Court allowed petitions of Stratton and Fidelity Assurance Association to intervene in the *Securities and Exchange Commission* case (R. 178, 182). Subsesequently, by an order dated May 13, 1946, the District Court allowed compensation of $75,000 to J. M. Welch, R. A. B. Cook and Louis Bernstein for their services in prosecuting the *Stratton* case (R. 180, 181). By an order dated May 9, 1946, the District Court allowed compensation of $14,000 to George B. Rowlings for his representation of the Receivers of Fidelity Assurance Association, as an intervening debenture-holder in the *Stratton* case (R. 223). The Circuit Court of Appeals has affirmed both awards.

The Question Presented:

May a District Judge, in an equity receivership, make allowance of $89,000 to attorneys for plaintiffs in a collateral case, in the absence of any record or proof of the necessity, extent or value of their services, other than the unsupported statement of said attorneys in oral argument that they and their associate counsel devoted a specified number of hours to the case?

The Reasons Relied on for Allowance of the Writ:

1. While judicial allowances of compensation to attorneys rest in the sound discretion of the Court, that discretion must be exercised according to well-established standards and principles, and upon a reviewable record.

2. The allowance of $75,000 to Respondent Welch and his associates was based upon Welch's oral statement of the number of hours spent by him and his associates, unsupported by any testimony or affidavit as to the nature or extent of the services, or their value. Moreover, his group contributed only incidental assistance to Aldred, the major task of protecting the Trust having been borne by the Securities and Exchange Commission, and any such allowance to him was palpably excessive and improper.

3. The allowance of $14,000 to Respondent Rowlings was predicated upon his oral statement of the number of hours spent by him and his associates, unsupported by any testimony or affidavit as to the nature or extent of the services, or their value. His services were of no benefit to Aldred, and were merely duplicatory of those rendered by the Securities and Exchange Commission and by Respondent Welch. Any allowance to him was improper.

4. In affirming the action of the District Court in making allowances to respondents Welch, Cook, Bernstein and Rowlings, the learned Circuit Court committed error, and reached a conclusion in conflict with decisions of this Court and of other Circuit Courts. That the allowance of counsel fees "rests in the sound discretion of the District Court", and that "considerable latitude must be allowed", are indisputable, but the exercise of "sound discretion" by a court requires a true and discernible connection between the court's award and the services thereby rewarded.

"Latitude" does not include the power to make awards which are not related by an intelligible record to the standards and principles recognized and enunciated by the courts.

5. To permit the District Court to make allowances in equity receiverships without any proof other than the oral assertion of attorneys as to the time spent by them, and to sustain allowances so made, as the learned Court below did here, because of the trial court's "intimate personal knowledge of the services rendered" is to invite and foster abuses in the allowances of fees and to preclude any intelligent review.

ARGUMENT

POINT I.

The only basis for the allowance of $75,000 to Mr. Welch and his associates is Mr. Welch's statement in oral argument that they spent a specified number of hours on the case. This is insufficient; it does not show what services were performed, or the necessity for them, or their value. To permit allowances to stand on such a foundation is virtually to deny the right of review. Moreover, on no reasonable evaluation could the services have justified an allowance of $75,000.

In making the allowance of $75,000 to Mr. Welch, the learned District Judge rendered no opinion (R. 88, 63, 180, 181, 223). The only exposition of Mr. Welch's services which was before the Court was (1) his petition (R. 179-180) which makes no pretense of detailing the services performed, and is completely silent as to the time spent and the value of the services, and (2) Mr. Welch's oral statement, which appears at pages 67 to 75 of the record. The oral statement is as barren as the petition of any description of the actual services rendered.

No time sheets were presented, and no affidavit or testimony was offered as to the nature of the services or their necessity, how long they took, what benefit, if any, resulted to the estate from them, or their value..

The learned Circuit Court rests its affirmance on the trial judge's "intimate personal knowledge" and his "broad discretion".

It must be apparent that if allowances may be based on such considerations, supported by nothing appearing in the record, the party who is required to make the payment is virtually deprived of any opportunity to review the award.

While the amount allowed to an attorney as a fee in an equity receivership, of course, rests in the sound discretion of the Court, that discretion must be "judicially" exercised, according to well-established standards. A court may not base its award on some vague or capricious concept of what may seem fair. It must rely instead on recognized precedents and established rules (see Gerdes, Corporate Reorganization, Vol. III, Chap. 25, and cases cited therein).

The function of the appellate court in reviewing allowances of fees is summarized in *In re Curtis*, 100 Fed. 784, 785-786 (C. C. A. 7th, 1900):

> "So also the amount to be allowed [to an attorney for petitioning creditors in an involuntary bankruptcy proceeding] does not rest in mere discretion. The amount must in all cases be reasonable, to be determined upon evidence of the service performed and of its value, and in the absence of evidence of its value, by the Court from knowledge of its worth. The amount to be allowed rests in legal judgment and judicial discretion, but not in unrestrained discretion, and that judgment and judicial discretion are subject to review. * * * The question is one of delicacy, but the

duty of review may not be put aside. It becomes us, therefore, to inquire with respect to the matter in hand concerning the character and value of the services rendered and of the grounds upon which the allowance was predicated".

The cases in which allowances granted by District Courts have been denied or substantially reduced by this Court and the Circuit Courts furnish a set of criteria against which the propriety of the allowances in the instant case must be tested.

A principle universally acknowledged is the necessity for limiting fees to be allowed out of a fund in court to a "reasonable minimum" (*Palmer* v. *Paramount Pictures, Inc.*, 85 F. (2d) 588, 590, 591 (C. C. A. 2nd, 1936)). This Court has been an especially vigilant guardian against unfairly enriching those who serve the fund at the expense of those who own the fund, and against what Mr. Chief Justice Taft called "vicarious generosity." *In re Gilbert*, 276 U. S. 294, 296 (1928). *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101 (1922); *United States* v. *Equitable Trust Co.*, 283 U. S. 738 (1931); *In re Realty Assoc. Sec. Corp.*, 69 F. (2d) 41 (C. C. A. 2nd, 1934), cert den. *sub nom. Bondholders' Committee, et al.* v. *Realty Assoc. Sec. Corp.*, 292 U. S. 628 (1934).

Attorneys who represent interests in receivership proceedings are not entitled to be compensated according to the standards which would prevail if they were representing the same interests in private litigation. *Callaghan* v. *R. F. C.*, 297 U. S. 464, 468 (1936); *In re Insull Utility Inv. Co.*, 74 F. (2d) 510, 516 (C. C. A. 7th, 1935); *Lincoln Printing Co.* v. *Middle West Utilities Co.*, 17 F. Supp. 799, 801 (N. D. Ill., 1936); *In re Paramount-Publix Corp.*, 12 F. Supp. 823, 828 (S. D. N. Y., 1935).

The most crucial test in determining the amount of allowance is the value of the services rendered in the

creation of the fund. *Louisville, E. & St. L. R. Co.* v. *Wilson*, 138 U. S. 501 (1891); *Milbank, Tweed & Hope* v. *McCue*, 111 F. (2d) 100 (C. C. A. 4th, 1940); *In re National Lock Co.*, 82 F. (2d) 600 (C. C. A. 7th, 1936); *In re Wayne Pump Co.*, 9 F. Supp. 940, 941 (N. D. Ind., 1935); Note, 49 Harvard L. Rev. 1199, 1200, 1203 (1936).

Mr. Welch's contribution consisted principally in instituting for his client the suit which first undertook to obtain a receivership of Aldred. An appraisal of the value of this contribution was made by a representative of the S. E. C., at the hearing on Mr. Welch's application:

> "Mr. Cashion: If your Honor please, in regard to the claims for fees by Mr. Welch, Mr. Cook and Mr. Bernstein, and also Mr. Rowlings, I want to make the statement that we feel that Mr. Welch and his colleagues made a very substantial contribution to the Securities and Exchange Commission case.
>
> That contribution, as we see it, however, consisted of a stipulation of the record of the trial in the *Stratton* case in the record of the Securities and Exchange Commission case. The work of investigation preparatory to the institution of the *Stratton* case I don't think particularly aided the Securities and Exchange Commission case, because the Securities and Exchange Commission had made its own independent investigation, and a very thorough one, and we instituted our action upon the basis of our own independent investigation.
>
> I also want to draw your Honor's attention—and I know that you will consider it—to the fact that the principles of law, or the law, upon which the *Stratton* case was based probably or in fact were different than the law applicable to the *Stratton* [sic] case, because in the *Stratton* case the benefit of the Investment

> Company Act of 1940 was not present. And if in the *Stratton* case, under the principles of law applicable there, the plaintiff might not have succeeded, then I think that should be taken into consideration" (R. 84).

Nor did the *Stratton* case result in any determination by the Court which can be regarded as beneficial to the Trust. The District Court appended to its opinion in *S. E. C.* v. *Aldred Investment Trust, supra*, the following memorandum:

> "In view of the fact that the relief prayed for in this, the *Stratton* case, has been fully granted in the S. E. C. case, it seems unnecessary to pass upon the merits of the *Stratton* case. The bill is therefore ordered dismissed without prejudice and without costs" (R. 137. See also, Judgment of Dismissal, R. 117).

After the S. E. C. had begun its proceedings under Section 36 of the Investment Company Act, the *Stratton* suit had a purely ancillary importance. Lawyers employed by the Commission performed the legal research, made the legal decisions, were charged with the legal responsibility, and accomplished the legal results which were of benefit to the Trust.

In short, although Mr. Welch's group anticipated the action by the S. E. C., their suit was on a theory of law quite different from that which prevailed and there is no finding or adjudication that their suit was well-founded or that they were entitled to prevail. Once the S. E. C. filed its suit, Mr. Welch's group became little more than onlookers.

It is a settled principle that an attorney who, after commencing the action, allows other persons to carry the weight of the litigation, is entitled only to a very limited al-

lowance. In *Commodity Credit Corp.* v. *Bell*, 107 F. (2d) 1001 (C. C. A. 5th, 1939) a receiver was allowed $5,000 and his attorney $2,000. The receivership involved 32,726 bales of cotton stored in warehouses upon which loans had been made aggregating $1,135,000. The Circuit Court of Appeals reduced both allowances by half and said (at pp. 1001, 1002):

> "* * * If we look solely to the figures and consider what would ordinarily be required, the fees in controversy are not unreasonable, but, as stated by the Court below, the litigant lifted all the labor and responsibility out of the hands of the receiver very soon after he was appointed, and left him with nothing to do except to make his report and claim his compensation.
>
> "We do not undervalue the excellent manner in which the receiver handled this matter nor the good advice given him by his attorney upon the few occasions when advice was needed, but the simple fact is that the case was settled before either the receiver or his attorney had earned anything like the amounts which they naturally expected to earn when the work was undertaken."

The analogy to the instant case is apparent. However devoted and valuable were the services Mr. Welch and his associates intended to render, their services were of no value to the estate because their preliminary work—investigation—was not availed of by the S. E. C. (R. 84) and it was the *S. E. C.* suit, and not theirs, which went to adjudication on the merits. Their suit was "dismissed" (R. 117, 137).

As Professor Medill wrote in *Fees and Expenses in Corporate Reorganization Under Section 77 B*, 34 Mich. L. Rev. 331, 338:

> "The working principle is that the services rendered and expenses incurred must be necessary and beneficial".

The reference is to allowances under former Section 77B of the Bankruptcy Act. But, as the author states in the same article (p. 331):

> "Section 77B is no more than a statutory restatement of the principles and practice followed by the courts of equity in administration suits."

Any services performed by Mr. Welch and his associates after the *S. E. C.* suit was filed were not *necessary*. The S. E. C. states unequivocally that Mr. Welch's preliminary work was of no value to it, that the Commission "had made its own independent investigation, and a very thorough one, *and we instituted our action upon the basis of our own independent investigation.*" The case is similar to *Feldblum* v. *Paramount Pictures*, 85 F. (2d) 596 (C. C. A. 2nd, 1936) where the attorney claiming compensation had initiated legal proceedings by filing (on behalf of certain stockholders) an involuntary petition in bankruptcy under Section 77B. This was contested by the Company. Subsequently the Company filed a voluntary petition, which the trial Court ordered would not prejudice the rights established by the petitioning attorney in the involuntary proceeding. The Court wrote:

> "It does not appear that any transfer was avoidable under the involuntary proceeding that would not have been voidable under the voluntary one. In view of the situation we hold that he was entitled to compensation for his services as attorney for the petitioning creditors and that $500 is a reasonable amount" (p. 597).

In the instant case, Welch accomplished nothing for the benefit of the Trust. After the *S. E. C.* proceeding was undertaken, any services Welch performed were unnecessary and mere duplication, for which he may not be rewarded out of the fund in the hands of the Court, no matter how well-intentioned his services may have been. *In re New York Investors*, 79 F. (2d) 182 (C. C. A. 2nd, 1935); *Davis* v. *Seneca Falls Mfg. Co.*, 17 F. (2d) 546 (C. C. A. 2nd, 1927); *Weed* v. *Central of Georgia Ry. Co.*, 100 Fed. 162 (C. C. A. 5th, 1900). (See Point II.)

The applicable rule is similar to that which requires attorneys representing creditors or stockholders, after the appointment of a receiver, to look for compensation to their own clients, rather than to the estate. *In re Eureka Upholstering Co.*, 48 F. (2d) 95 (C. C. A. 2nd, 1931); *In re New York Investors*, 79 F. (2d) 179 (C. C. A. 2nd, 1935), *cert. den. sub nom. Endelman* v. *R. F. C.*, 296 U. S. 649 (1935); *In re Realty Assoc. Sec. Corp.*, 69 F. (2d) 41 (C. C. A. 2nd, 1934), *cert. den. sub nom. Bondholder's Committee* v. *Realty Assoc. Sec. Corp.*, 292 U. S. 628 (1934). This follows because the estate is ordinarily represented by a receiver or trustee whose duty it is to take all steps necessary to protect it; and only when he neglects his duty, and a suit by others is necessary in order to recover assets or prevent waste, will compensation or recoupment of expenses be awarded as though proceedings had been at his instance. *Palmer* v. *Paramount Pictures, Inc.*, 85 F. (2d) 588 (C. C. A. 2nd, 1936); *United States* v. *Equitable Trust Co.*, 283 U. S. 738 (1931); *Trustees* v. *Greenough*, 105 U. S. 527 (1882).

As in those cases, any creditor or stockholder has a right to be heard. But the prime necessity for preserving the assets of the estate requires that attorneys for these creditors and stockholders be denied compensation out of the estate. The Commission here stands in the position

relative to Mr. Welch's group that a receiver does at a later stage in the proceeding to a petitioning creditor. After initiating its suit, the Commission became the representative of all groups.

Mr. Welch's allowance, therefore, must be limited to the value of his services in commencing the *Stratton* suit. But an allowance of $75,000 is permissible in only the rarest kind of receivership, to which an attorney makes a contribution of heroic stature. "The highest compensation ever approved by the Interstate Commerce Commission and the courts for trustees of railroads who devote their entire time to the duties of that position is $36,000 per annum, and the compensation for their attorneys has been placed on a correspondingly moderate basis." See *Lincoln Printing Co.* v. *Middle West Utilities Co.*, 17 F. Supp. 799, 801 (N. D. Ill., 1936).

Trustees Corp. v. *Kansas City M. & O. Ry. Co.*, 26 F. (2d) 876 (C. C. A. 8th, 1928), involved allowances for a receiver and his attorney whose services had been of the highest value. They had devoted all their efforts to the task over a long period of time, and, in the language of the Court, had "pulled the road out of the mire". Even in these circumstances the court felt compelled to halve the allowance ordered by the lower court; the receiver was awarded $40,000 per year and his attorney $35,000. This case is but one of many which serve to point out that fees such as that allowed Mr. Welch and his associates are permitted only in most extraordinary cases and then only to those whose services benefitted the fund enormously. See cases collected in 143 A. L. R. 772-780.

In his oral argument in the District Court, Mr. Welch compared himself with attorneys who bring suits on behalf of minority stockholders and recover for the corporation large sums of money which would otherwise have been lost to it; he emphasized that such attorneys are richly

rewarded for the benefit which their efforts bring to the corporation (R. 69-71). But Mr. Welch performed no such service here; he recovered nothing for the Trust. Aldred is solvent today, where it was insolvent before, for the sole reason that the market value of the securities it holds has greatly increased and because the value of a single asset, Eastern Racing Association, has trebled (R. 147, 148). This was the result of generally improved business conditions and the enhancement in the value of the Eastern Racing Association stock; it had nothing to do with the legal proceedings involved. The sole beneficial result of the legal proceedings was the ousting of irresponsible management, and this was accomplished by the *S. E. C.* case, not the *Stratton* action.

Smith v. *Central Trust Co.*, 139 F. (2d) 733 (C. C. A. 4th, 1944) was similar to the instant case in that the value of the debtor's estate increased during the pendency of the proceedings solely by reason of a rise in the market price of the securities it owned (see footnote 3, p. 738). There, allowances were sought by the trustee and his attorneys under Chapter X of the Bankruptcy Act. The petition for reorganization had been dismissed because the interests of creditors, it was held, would best be served in a state court proceeding. Notwithstanding conscientious service to the debtor over a continuous period of two years, the Court said (at p. 738):

> "• • • it is obvious that the failure of the reorganization and the dismissal of the proceedings are facts which should be considered in fixing the amount of the compensation, for the outlay must be made at the expense of the creditors who will have received no benefit from the efforts put forth, no matter how well intentioned they may have been. In our view insufficient weight has been given to these considerations in the present case; • • •"

The Court ordered the trustee's allowance reduced to $25,000 and that of his attorneys to $20,000 (p. 739), despite the increase in the company's assets and despite the fact that the attorneys had been obliged to contest the suit in appeals before the Circuit Court of Appeals and the United States Supreme Court.

On what basis, then, did Mr. Welch's services entitle him and his associates to an allowance of $75,000? He cannot claim that his services created a fund, or even preserved a fund.

Mr. Welch presented no "time sheets" of any kind to establish the number of hours necessarily spent in the service of Aldred, although it is the general practice to follow the procedure prescribed by the Bankruptcy Act and submit verified and itemized statements with sworn affidavits. Courts have consistently drawn unfavorable inferences from such general estimates and have either reduced the allowances or remanded the case with instructions to obtain a detailed record. See Medill, *Fees and Expenses in Corporate Reorganization Under Section 77 B*, 34 Mich. L. Rev. 331, 332, and cases there cited: *Elsesser* v. *Pfleging*, 254 App. Div. 753 (N. Y., 1938); *Kephart* v. *Horvath*, 263 Mich. 211, 248 N. W. 598 (1933); *Dykman* v. *New York*, 183 App. Div. 859 N. Y. 1918); *City Nat. Bank & T. Co. of Chicago* v. *Sewell*, 300 Ill. App. 582, 21 N. E. (2d) 810 (1939).

Mr. Welch states that he and his associates spent 2100 hours on matters related to Aldred. That statement, since it is undocumented and is unsupported by any written records, can, at best, be only a guess. However, even that figure, if accepted, would not support the allowance made, on the basis of comparison with fees allowed in other cases. *In re Allied Owners*, 79 F. (2d) 187 (C. C. A. 2nd, 1935); aff'd *sub nom. Callaghan* v. *R. F. C.*, 297 U. S. 464 (1936) required the Circuit Court to pass on the propriety

of a fee of $75,000 to attorneys for the trustees in bankruptcy. The Court wrote:

> " • • • These and many other important matters, such as litigation over the Ringling note, requiring skill and experience, are said to have occupied one or more of the partners in Goldwater & Flynn and two of their legal assistants for some 4,508 hours, of which 3,023 were those of their assistants. Many of the things done by these lawyers, as is always the case, were routine matters; many were matters of large importance; many were of a sort preliminary to the reorganization, which has not yet been completed. We think $50,000 is a reasonable compensation for these attorneys, and we award that amount, instead of $75,000, to which is to be added their disbursements of $1,247.80 directed to be paid by the District Judge" (p. 191).

As Judge Swan said in *Franklin* v. *City of New York*, 144 F. (2d) 571, 574 (C. C. A. 2nd, 1944):

> "In appraising the value of an attorney's services in a receivership proceeding benefit to the estate and accomplishment rather than effort or time consumed supply the measuring yardstick".

There is nothing in this record to show the services performed, or that they were necessary, or in what way they benefited the estate, or their value. There is only Mr. Welch's oral approximation in the course of argument of the time spent by him and his associates on matters relating to the case. This, we submit, was insufficient; it not only furnished no basis for evaluation of the services by the District Judge, but it makes any intelligent review of his decision utterly impossible. To permit substantial

allowances to stand on such a foundation is virtually to deny the right of appeal, and this result is in no way altered by the statement of the Trial Judge that he is personally familiar with the services performed.

In any event, the allowance of $75,000 for services which consisted only in initiating the *Stratton* suit (which was of no value in enhancing the estate) was obviously an abuse of discretion. It should have been drastically reduced by the Circuit Court.

POINT II.

The allowance of $14,000 to Mr. Rowlings is based on his oral statement of the number of hours spent on the case. It is erroneous for the same reasons as those discussed with respect to the allowance to Mr. Welch and his associates. Moreover any services performed by Mr. Rowlings merely duplicated those of Mr. Welch and the S. E. C. His claim should have been disallowed in toto.

The only record before the District Court of Mr. Rowlings' services was (1) the brief Petition for allowance (R. 221), and (2) the oral exposition which appears at pages 75 to 78 of the record. As in the case of the allowance to Mr. Welch, the District Court did not require the filing of a petition such as is required under Sections 62(a) and 249 of the Bankruptcy Act. The Petition filed is a sketchy, formal document containing no description of services, no analysis of their importance or value. It is no more than a notice that an application is being made. The oral statement is equally barren of any basis upon which a Court can make any understandable evaluation of Mr. Rowlings' services. The affirmance of the allowance to Mr. Rowlings was erroneous not only because it was unsupported by a proper record, but because it violates the recognized doctrine respecting duplication of services.

One of the fundamental rules governing allowances to attorneys in receivership or bankruptcy proceedings is that attorneys representing persons whose interests are already represented by others are not entitled to compensation from the estate. This is a necessary corollary of the principle that allowances may be made only to those whose services were necessary to the estate. (See Point I.)

The services rendered by Mr. Rowlings were in behalf of receivers for Fidelity Assurance Association (R. 223), holders of debentures issued by Aldred. The interests of these debenture-holders were represented throughout by the Securities & Exchange Commission, just as Stratton's interests were so represented. All that is said in Point I, with reference to the allowance to Mr. Welch applies, therefore, *a fortiori*, to the allowance to Mr. Rowlings.

But in addition to being represented by the Commission, these debenture-holders were represented by Welch, whose client was a debenture-holder of the identical class. The District Court so found (R. 237).

The District Court, two years before it rewarded Mr. Rowlings so generously for his "services", expressed the opinion that "the intervention of this petitioner would add nothing to this issue and might complicate it." (Court's Memorandum, March 23, 1944, denying the motion by Receivers of Fidelity Assurance Association to intervene in the *Stratton* case, R. 229.) Mr. Rowlings' clients again pressed for intervention following this Memorandum. In their application to the court they stated:

> "Unquestionably the claim of these interveners is in subordination to and entirely in recognition of the original proceedings. *No new claims are asserted by them. They support precisely the allegations of the plaintiff and seek the same relief, no more and no less*" (R. 235). (Italics supplied.)

They recognized further that "*the issues will be precisely the same as if the intervention had not been asked*" (R. 236). On the basis of the acknowledgment by Mr. Rowlings' clients that they were to be mere bystanders in the case, ready to take over only if Mr. Welch and his associates should abandon the proceeding (R. 234), the District Court finally allowed their petition to intervene in the *Stratton* case. The learned District Judge wrote (R. 239):

> "The Court is of the opinion that the claims of these petitioners have a common question of law or fact with the original plaintiff and that these interventions will not unduly delay the hearing on the merits."

He allowed their petition to intervene "without prejudice to the adjudication of the rights of the original parties". (Court's Memorandum, May 24, 1944 allowing petition to intervene, R. 237.)

In a case involving mere parallel representation the authorities are unanimous in denying any compensation from the estate. There are at least two valid reasons for the rule: (1) the necessity of preserving the assets of the estate; (2) the fact that one who intervenes, despite the efforts of persons already representing his interests, does so for his own benefit rather than the benefit of the estate. It is the basis of the provision in the Bankruptcy Act which permits only "one reasonable attorney's fee" [Sec. 64 (a) (1), 11 U. S. C. A. Sec. 104 (a) (1)], which does no more than codify the practice in equity receivership proceedings. Medill, *Fees and Expenses in Corporate Reorganizations Under Section 77 B*, 34 Mich. L. Rev. 331, 368.

The rule is of general application. It denies all compensation where services are being competently performed by the attorney for a receiver or trustee. *Clark* v. *Goodman*, 124 F. (2d) 491 (C. C. A. 2nd, 1941); *Davis* v. *Seneca Falls*

Mfg. Co., 17 F. (2d) 546 (C. C. A. 2nd, 1927); Medill, *supra*, p. 358, and cases there cited. Similarly, it denies compensation or reimbursement of expenses to a creditor when another creditor of the same class has already intervened. *In re Diamond Fuel Co.*, 6 F. (2d) 773 (C. C. A. 2nd, 1925); *In re Porto Rican American Tobacco Co.*, 117 F. (2d) 599 (C. C. A. 2nd, 1941). As the Court said in *Nolte* v. *Hudson Nav. Co.*, 47 F. (2d) 166, 168 (C. C. A. 2nd, 1931):

> "The theory on which the expenses as well as the benefits are to be shared rests on the assumption that those who act represent the others, *Lamar* v. *Hall & Wimberly* (C. C. A.) 129 F. 79, and so, where creditors are represented by counsel of their own choice, who do in fact act for them, they cannot be compelled to share in the expenses incurred by the employment of other counsel by other creditors, *Fletcher* v. *Coomes, et al.*, 20 App. D. C. 159, 285 F. 893."

In *In re Paramount Publix Corp.*, 85 F. (2d) 588 (C. C. A. 2nd, 1936), *cert. den.* 300 U. S. 655 (1937), an attorney who had represented stockholders and creditors sought compensation for various services allegedly rendered to the debtor, among them a reduction in the rate of interest on money borrowed from banks. In denying the right to an allowanee, the Court said (at p. 590):

> "Before appellant could properly claim an allowance out of the general estate, he ought to have satisfied the court that the stockholders * * * or the creditors * * * for whom he appeared, needed as members of a class further representation in connection with the reorganization than that already available to them. * * * This he failed to do.
>
> * * * * *

> "Under all the circumstances compensation should be allowed only where services are reasonably required, whether those rendering them be committees or individuals. *In re A. Herz, Inc.*, 81 F. (2d) 511 (C. C. A. 7th, 1936)".

Mr. Rowlings has made no attempt to show that the interveners he acted for required representation in addition to that afforded them by Mr. Welch and the Commission. The fact that Rowlings may have contributed advise is wholly irrelevant (R. 75, 78). In *Warren* v. *Palmer*, 132 F. (2d) 665 (C. C. A. 2nd, 1942), the Court said (at p. 669):

> "Petitioners also assert that they were required to keep in constant touch with the various plans proposed because of their interest and claim reimbursement for those activities. But this court has declared that 'mere participation in the hearings, * * * or offering advice, suggestions, or criticisms regarding the proposed plan, or on matters of procedure, does not give rise to any claim for compensation from the estate. In re Paramount Public Corp., supra, 85 F. (2d) at page 591. See also Milbank, Tweed & Hope v. McCue, 4 Cir., 111 F. (2d) 100, 101.' "

See also *Barker* v. *Southern Bldg. & Loan Ass'n*, 181 Fed. 636 (N. D. Ala., 1910); *In re McMillan Rapp & Co.*, 36 F. Supp. 663 (E. D. Pa., 1941), holding that incidental assistance, however valuable and well intended, may not be made the basis for an allowance from the estate.

Under settled authority, there is no basis for compensation in any amount to Mr. Rowlings. If his services were of value to Mr. Welch, whose efforts he admittedly duplicated, he should look to Mr. Welch and his associates for compensation.

CONCLUSION.

Any attempt to review allowances to Counsel upon the record afforded by the respective petitions of Welch and Rowlings, implemented by their oral statements, is necessarily futile. Awards based upon such records are immune from that scrutiny by appellate Courts which affords the only safeguard against carelessness, caprice and unjustified liberality.

The petition for certiorari should be granted.

Respectfully submitted,

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